Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1995

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JOSEPH LEE ROWLAND,
*Petitioner*

*versus*

COMMONWEALTH OF KENTUCKY,
*Respondent*

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On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

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## SUPPLEMENTAL APPENDIX

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TO BE PUBLISHED

# COURT OF APPEALS OF KENTUCKY

## No. 92-CA-001615-MR

JOSEPH LEE ROWLAND - - - - - - - *Appellant*

*v.*

COMMONWEALTH OF KENTUCKY - - - - *Appellee*

*Appeal From Grant Circuit Court*
*Honorable Charles F. Satterwhite, Judge*
*Indictment No. 91-CR-000059*

## OPINION—AFFIRMING

BEFORE: HUDDLESTON, JOHNSON and JOHNSTONE, Judges.

HUDDLESTON, JUDGE. Joseph Lee Rowland entered a conditional plea of guilty to two counts of assault in the second degree and was sentenced by Grant Circuit Court to concurrent ten year terms of imprisonment.[1] He appeals pursuant to Rule 8.09 of the Kentucky Rules of Criminal Procedure[2] asserting that the trial court erred when it per-

[1]Rowland, who was seventeen years of age when he entered his plea, was sentenced as a youthful offender according to KRS 640.030.

[2]RCr 8.09 provides: "With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion. A defendant shall be allowed to withdraw such plea upon prevailing on appeal."

mitted a witness who had undergone hypnosis to testify for the Commonwealth. He also maintains that his motion for continuance of his trial should have been granted and that the trial court should have sustained his motion for appointment of an expert on traumatic stress syndrome. Because we are satisfied that the trial court's rulings on each of these issues were correct, we affirm the judgment from which this appeal is prosecuted.

Carol Rowland and her daughter, Kathy Shardine, were shot on January 29, 1991, at the home they occupied with Carol's husband, Daniel, her four children by a previous marriage (including Kathy), and Daniel's two children. Carol was seriously wounded, and for some time after the incident her memory of it was limited. She did, however, tell her husband at the hospital where she received emergency treatment that she thought she had been shot by Daniel's son, the appellant Joe Rowland.

Carol became depressed after the incident and sought treatment from Dr. Bruce A. Snider, a psychiatrist. Dr. Snider diagnosed Carol as suffering from post-traumatic stress disorder and secondary depression. According to Dr. Snider, one symptom of post-traumatic stress disorder is the inability to recall all or part of the traumatic event. Dr. Snider, whose treatment is not at issue on this appeal, referred Carol for further treatment to Dr. William Webster, a psychologist. In the course of his treatment of Carol, Dr. Webster hypnotized her.

Carol gave statements about the shooting to Dr. Webster on September 30, 1991, and again on October 16, 1991. Both statements were given before Carol was hypnotized. The first statement was recorded on audio tape and the second was recorded on videotape. In the statements, Carol described the shooting in some detail and identified her stepson, Joe Rowland, as the person who shot her. Carol recalled additional details about the incident while under hypnosis, and her description of Joe Rowland's appearance at the time of the shooting was more specific.

Prior to trial, appellant moved to suppress Carol's testimony in its entirety, arguing that she had been tainted as a witness because she had undergone hypnosis. The trial court denied the motion to suppress and the case went to trial. Carol was called to testify and, in essence, repeated her prehypnosis description of the shooting incident. She was not asked to — and did not — relate details of the incident first recalled while under hypnosis. Carol never wavered from her identification of Joe Rowland as the person who did the shooting. After Carol testified on direct, the appellant withdrew his pleas of not guilty to the two counts of assault in the first degree and, as earlier noted, entered conditional pleas of guilty to two counts of assault in the second degree.

On appeal, the appellant does not argue that Carol was only able to identify him as the perpetrator of the crime after she was hypnotized. His complaint is that hypnosis enabled Carol to remember the incident in greater detail and to describe the way her stepson looked at the time with greater specificity. According to the appellant:

> These post-hypnosis "recollections" clearly bolstered Carol's confidence in her testimony where she identified the Appellant as her assailant. Prior to the hypnosis, the sole identifying feature of the Appellant that Carol could describe was his eyes. Subsequent to the hypnosis, she could describe the Appellant's head, hair (its color, length, and the way it was parted), and his coat (including its color and the fact it was "frosted"). [T]he hypnosis in this case bolstered Carol's definitive trial identification of the Appellant, based on these new "detailed" particulars of the Appellant's descriptions (sic).

The appellant argues for a "per se" rule which would preclude from testifying any witness who has undergone hypnosis. In *Rock* v. *Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), the United States Supreme Court held that a state could not erect a per se rule excluding hypnotically refreshed testimony from a criminal defendant. While the case before this Court involves testi-

mony from a witness rather than a defendant, an issue *Rock* specifically did not reach, *Rock* does describe the three main approaches used by states dealing with this issue. One approach is to establish a per se rule excluding any hypnotically refreshed testimony at trial; however, even under this rule, the witness is still allowed to testify about the details of events that he recalled prior to undergoing hypnosis. See, e.g., *Contreras* v. *State*, 718 P.2d 129 (Alaska 1986). Another approach holds that hypnosis affects the credibility, not the weight, of testimony and that such testimony is admissible at trial. See, e.g., *State* v. *Brown*, 337 N.W.2d 138 (N.D. 1983). The third approach admits hypnotically refreshed testimony if certain procedural safeguards are met. See, e.g., *State* v. *Hurd*, 432 A.2d 86 (N.J. 1981).

The rationale of the cases adopting a per se rule excluding hypnotically refreshed testimony is that hypnosis has not met the general acceptance in the scientific community standard for the admission of scientific evidence set forth in *Frye* v. *United States*, 54 App. D.C. 46, 293 F. 1013 (1923). See, e.g., *State* v. *Peoples*, 311 N.C. 515, 319 S.E.2d 177 (1984). As was explained in *Hall* v. *Commonwealth*, 12 Va.App. 198, 403 S.E.2d 362, 369 (1984):

> While hypnotically refreshed testimony is not "scientific evidence" per se, since the testimony in question is that of a lay witness rather than an expert opinion, it has been generally held that the Frye analysis is equally applicable to hypnotically refreshed testimony, because the testimony given by the lay witness is the product of scientific intervention.

The courts of this Commonwealth also apply the *Frye* standard when determining whether to admit scientific evidence. See *Harris* v. *Commonwealth*, Ky., 846 S.W.2d 678 (1992). Since the *Harris* decision was handed down, the United States Supreme Court has held in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), that the adoption of the Federal Rules of Evidence superseded any past reliance on the

*Frye* test and that the proper standard for judging the admissibility of scientific evidence is provided by FRE 702. The Supreme Court ruled that, upon making a determination that the scientific evidence in question will assist the trier of fact to understand or determine a fact in issue under FRE 104(a), the trial court should conduct a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can be properly applied to the facts in issue." *Daubert*, 509 U.S. at ____, 113 S.Ct. at ___, 125 L.Ed.2d at 482. In making this determination, the trial court should consider such factors as whether the theory or technique has been tested; whether it has been subjected to peer review and publication; its known or potential rate of error; and finally, the degree of acceptance the theory or technique enjoys in the scientific community. *Id.*, 509 U.S. at ___, 113 S.Ct. at ___, 125 L.Ed.2d at 482.

In July of 1992, Kentucky adopted a modified version of the Federal Rules of Evidence for use in the courts of this state. Rule 702 of the Kentucky Rules of Evidence, which governs the admissibility of expert testimony and which is identical to FRE 702, provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In light of *Daubert* and the adoption of the Kentucky Rules of Evidence, it is inappropriate to adopt a per se rule excluding hypnotically refreshed testimony. However, we are aware that the trial and resultant guilty plea in this matter took place prior to the formal adoption of the Kentucky Rules of Evidence. Accordingly, the *Frye* test must be applied if hypnotically refreshed testimony is to be admitted.

> It must be found by the trial court that the evidence "be sufficiently established to have gained general ac-

> ceptance in this particular field in which it belongs." The party offering the evidence has the burden of proving that this new evidence has gained general acceptance as reliable in the relevant scientific community.

However, it is not necessary that the *Frye* test be applied in this case. Many courts — including those that have held hypnotically enhanced testimony inadmissible — have ruled that a witness may testify as to matters demonstrably recalled and related by the witness before he or she was hypnotized. In doing so, they have generally required as a prerequisite to the admission of the testimony that the witness' prehypnotic recollections have been recorded in written or taped form so that the extent and particulars of such recall may be established. See the cases from the states of Alaska, Arizona, Delaware, Kansas, Maryland and Ohio cited in Thomas M. Fleming, Annot., *Admissibility of Hypnotically Refreshed or Enhanced Testimony*, 77 ALR 4th 927, 940 (1990), as well as the Virginia case, *Hall* v. *Commonwealth*, *supra*.

Some states require the trial court confronted with a witness who has been hypnotized to conduct a hearing

> . . . to consider the amount of confidence the witness had in his initial recollection before he was hypnotized, the extent of the witness' belief in the efficacy of hypnosis to yield truth, the nature of the questioning employed, and any other factors relevant to a determination whether hypnosis so enhanced the witness' confidence in his original recollection that the opposing party's right to cross-examination has been substantially impaired.

Annot., 77 ALR 4th at 940. In *Elliotte* v. *State of Delaware*, 515 A.2d 677, 680 (Del. 1986), for example, the court observed that "nearly all states which have addressed the . . . issue . . . have ruled that testimony as to prehypnotic recollections is admissible." Consistent with those decisions, the Delaware Supreme Court ruled that "pretrial use of hypnosis does not necessarily render the witness incompetent to testify to events recalled prior to being hypnotized." *Id.* at 681.

The Delaware court went on to hold that the trial court should conduct a hearing to determine whether hypnosis has substantially impaired the defendant's ability to cross-examine the witness or was otherwise improper. At such hearing, the trial court must first decide whether the scope of the witness's prehypnotic recollection can be reliably determined. Then the court must determine whether hypnosis so enhanced the witness's confidence in his or her testimony that the opposing party's right to cross-examination has been materially impaired. In making the latter determination, the Delaware Supreme Court admonished trial courts to consider the six factors set forth in *People* v. *Tunstall*, 63 N.Y.2d 1, 479 N.Y.S.2d 192, 196, 468 N.E.2d 30, 34 (N.Y.Ct.App. 1984):

> (1) The amount of confidence the witness had in her initial recollection prior to being hypnotized;
>
> (2) The extent of her belief in the ability of hypnosis to yield the truth;
>
> (3) The degree to which she was hypnotized;
>
> (4) The length of the session;
>
> (5) The type and nature of questioning employed; and
>
> (6) Any other factors which the court may deem important based upon the specific facts and circumstances of this case.

*Elliotte*, 515 A.2d at 681.

In the case before us, the trial court conducted an extended inquiry into the circumstances surrounding the hypnosis of Carol Rowland. The court had before it, as do we, the tapes of Carol's statements made before she was hypnotized and while hypnotized, as well as the testimony of two expert and two lay witnesses. The court made findings as to each of the matters referred to in the *Elliotte* and *Tunstall* decisions (although it may not have used the precise language of those decisions) and ruled Carol's testimony admissible. While we shall never know for certain whether the appellant's right to cross-examine Carol was materially impaired by hypnosis inasmuch as he plead

guilty before cross-examination could begin, the trial court's decision to admit Carol's testimony is unassailable in light of the fact that she related on direct examination essentially the same facts she had recalled prior to being hypnotized.

Appellant's other issues do not merit nearly as much discussion. The appellant contends that he was entitled to a continuance of his trial due to illness, which limited his ability to consult with his attorney. Initially, we note that the trial court has considerable discretion when dealing with a motion for a continuance. *Abbott* v. *Commonwealth*, Ky., 822 S.W.2d 417 (1992). In light of appellant's trial counsel's representation to the court that by staying with his client after trial each day that he could properly prepare him, we find no abuse of discretion in the denial of a continuance.

Appellant also complains that the trial court erred when it denied his motion for an expert on traumatic stress syndrome to rebut testimony about this syndrome from Dr. Snider. Again, this is an area where trial courts have discretion to decide whether the use of an expert witness is reasonably necessary pursuant to *Ake* v. *Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). See *Hicks* v. *Commonwealth*, Ky., 670 S.W.2d 837 (1984). The record reveals that the appellant waited until the day of trial to make his motion for a rebuttal expert. In light of the appellant's failure to timely make this motion, we cannot say that the trial court erred by denying it.

The judgment is affirmed.

ALL CONCUR.

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